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Issues and challenges

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IDENTITY PROTECTION AND PRIVACY OF YOUNG OFFENDERS: ISSUES AND CHALLENGES

**PAPER PRESENTED TO THE CONFERENCE ON
INDIGENOUS YOUNG PEOPLE, CRIME AND JUSTICE**

**AUSTRALIAN INSTITUTE OF CRIMINOLOGY & OTHERS
31 AUGUST TO 1 SEPTEMBER 2009
CROWNE PLAZA, PARRAMATTA, SYDNEY**

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BOND UNIVERSITY**

Presented by Professor Duncan Chappell, Law Faculty, University of Sydney

BACKGROUND

I want to tell you first how I became involved in thinking about this issue. About three years ago now I was asked by legal aid to act as an expert witness in a case being brought by John Fairfax, publishers among other things of *The Sydney Morning Herald*, who were seeking to unlock the name of four persons who had been involved in a series of vicious rapes that took place in Sydney. They wanted to reveal the full names of the four Pakistani brothers MSK, MAK, MMK, MRK and to remove their identity protections, and in addition to other claims, said that they should be just not named but shamed as well (see Judgment in the Application by John Fairfax Publishing re MSK, MAK, MMK and MRK [2006] NSWCCA 386).

The case actually never reached a full blown trial and thus I didn't have to appear. This was just as well since a colleague of mine Professor Mark Findlay from the same law school, was on the other side arguing for Fairfax, or should I say he was acting as an independent expert, and he took a different view from me. However, the court decided that in NSW (which I will discuss in more detail later), which protects the identity of young people in criminal proceedings in the children's court or the adult

court that there is a discretion nonetheless for the court if the interests of justice outweigh those of the individual to in fact remove the barriers for publication. In this case the court said because the application had not been brought by the prosecution at the time of the sentencing of the four brothers, there was no standing on the part of Fairfax to proceed. So the case simply represents a legal precedent on that issue.

There have been cases in which young people have been identified, another rape case, which was equally notorious involved the Skaf brothers where two of the brothers were juveniles at the time of the offences and the court exercised its discretion on the application of the prosecution to reveal the identity of one of the juveniles at the time but by then who was an adult who was responsible for those rapes (see Channel 9 news site <http://news.ninemsn.com.au/national/699649/gang-rape-skaf-brothers-get-jail-terms-cut>).

I have written about this issue with my co-researcher Robyn Lincoln from Bond University and these articles have been published in *Current Issues in Criminal Justice* — two separate comments for those of you who are familiar with the CICJ journal will also be able to find it online (see *Abandoning Identity Protection for Juvenile Offenders*, 2007, *CICJ* 18(3), 481-487; *Shhh...We Can't Tell You: An Update on the Naming of Young Offenders*, 2009, *CICJ* 20(3), 476-484).

What I want to do today actually is to talk to you about a number of things. Firstly, to put this in the context of human rights principles, second to say something about how Australia has up till now dealt with it in the human rights context, to then look at the politics of this since it is now a political issue not just a human rights and legal issue, and to talk in more detail about the NSW legislative council select committee that has examined this whole question I think in a very thorough and important way. Then discuss our planned Northern Territory research and what we know about the impacts of naming and shaming, particularly as they may affect indigenous youth, and say something about future directions.

1. HUMAN RIGHTS PRINCIPLES

So this is an issue that needs to be addressed from either the human rights perspective and through a human rights lens no more so than the case of the United Nations Convention on the Rights of the Child which is in fact the most ratified convention in the UN. It is recognised by all but two states. Australia ratified it and it recognises that a child should be given identity protection and privacy.

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth...

2(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees: ...

vii) To have his or her privacy fully respected at all stages of the proceedings.

Every child below the age of eighteen years has rights that should be respected by all this is what was ratified in 1989 by the general assembly, in regard to rights in the criminal justice system.

To have his or her privacy fully respected at all stages of the proceedings is a principle which is based upon an earlier set of United Nations rules, the rules for the minimum standards of the administration of juvenile justice or otherwise called the Beijing Rules. They protect privacy or include a provision for the protection of privacy that it needs to respect at all stages of a criminal proceeding in order to avoid harm being caused to her or him by undue publicity or by the process of labelling and the principle that no information that could lead to the identification of a juvenile offender should be published.

United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")

8. Protection of privacy

8.1 The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling.

8.2 In principle, no information that may lead to the identification of a juvenile offender shall be published.

2. AUSTRALIAN RESPONSES

So how then do our laws currently respect those principles — and I should emphasise that these are principles that clearly apply to all young people not just indigenous young people — but they undoubtedly affect indigenous young people for the reasons we have heard about since they are so disproportionately represented in the juvenile justice system.

11 Publication and broadcasting of names

1. The name of any of the following persons must not be published or broadcast in a way that connects the person with the criminal proceedings concerned:

(a) any person who:

(i) appears as a witness before a court in any criminal proceedings, or to whom any criminal proceedings relate, and

(ii) was a child when the offence to which the proceedings relate was committed

In NSW the NSW Children's Criminal Proceedings Act of 1987 is a good example of how protections are set out in a statute. Basically that piece of legislation says that in any criminal proceeding the publication or broadcasting of names of anyone who appears as a witness or who is before the court who is a child is prohibited and there are criminal penalties for those who offend against that. Alan Jones is an offender on a number of occasions and has been brought to court, although in general it is not

something that is widely breached. There is an exception to that rule where it is in the interests of justice but they are rarely invoked. The NSW legislation is generally followed in nearly all the other Australian jurisdictions with the noted exception of the Northern Territory.

YOUTH JUSTICE ACT 2005 (NO 32 OF 2005) - SECT 50

Restriction of publication of proceedings

(1) The Court may, in an order under section 49 or by a separate order, direct that a report of, or information relating to, proceedings in the Court, or the result of proceedings against a youth before the Court, must not be published.

In the Northern Territory the naming of young people in the justice system whether in children's court or adult court is not prohibited unless a specific application is made at the time to the court for the proceedings to be closed or for the naming of anyone to be prohibited. Again, my understanding is (we have yet been able to do the research) in most cases goes ahead and there is no application made to prohibit it, so it is a very different approach to the one that applies elsewhere across the country. The rest of the country is in broad concurrence with the United Nations Convention on the Rights of the Child (CROC).

3. CONTEMPORARY POLITICAL DEVELOPMENTS

This has recently become a political issue since our politicians just love naming and shaming. In the Territory's election in 2005 the opposition saw this as one of the planks upon which it sought re-election. It said that if it regained office it would make sure that juveniles were not only named in the media but would be brought in front of public meetings and publicly shamed and would be required to wear bright orange T-shirts with the words named and shamed across them. They weren't re-elected (for a host of reasons) at that time and the human rights commission came out and urged the Northern Territory to stop this nonsense and to respect the UN principles and those that were being espoused by Australia in the ratification of the UN CROC.

NT Opposition to 'name and shame' juvenile offenders

ABC News, Tuesday, 24 May 2005

The Opposition spokesman on Young Territorians, Terry Mills, says it will see juveniles being named in the media or in front of public meetings, and in some cases require them to wear a bright orange T-shirt with the words 'name and shame' (see <http://www.abc.net.au/news/items/200505/1375906.htm?elections/nt/2005/>).

However, this did not necessarily have a great effect because shortly after the Human Rights Commission made a statement, Queensland Chief Justice Paul de Jersey in an interview reported in the *The Sunday Mail* in Queensland said that juveniles who repeatedly broke into homes, stole cars, or sprayed graffiti should be allowed to be named and he said that while many people would not agree with this

it was his job to encourage debate. He didn't need to encourage it because it was already very active in the political front.

The Sunday Mail, Saturday, 4 November 2006

Queensland's Chief Justice Paul de Jersey wants courts to have the power to name juveniles who repeatedly break into homes, steal cars or spray graffiti. He's told *The Sunday Mail* that courts should be allowed to name persistent offenders as a powerful deterrent to young people. While admitting many would not agree, he said it was his job to encourage debate.

In the next Queensland election, it was no surprise that the then Opposition leader Mr Springborg and his colleagues again thought this was a good platform to run on and said that they would name and shame anyone over the age of 14 who committed serious crimes, if they gained government. At the time the then government indicated that this was not in their view a good idea, but just a few months into office after being re-elected, the Premier Anna Bligh promised 'tough love' which incorporated the naming and shaming of the worst juveniles. So it seems in Queensland that something is going to be changed in the context of the legal provisions which at the moment prevent that occurring.

Last but not least, in a way, in Western Australia in very recent times, the newly-elected government there has said that it is going not just in principle but in practice to introduce legislation which will in fact name and shame juveniles. The Attorney General who is well qualified (see pp slides) is ready to say that the time has come in WA for this. They are going to base their legislation it is suggested on the British program for anti-social behaviour orders (and I will say more about this later) which you can see are not just naming of young people in criminal proceedings but go well beyond that and actively seek to shame them in a range of ways and place severe restrictions on their movements.

The State Government is preparing new laws that could see juveniles who are convicted of anti-social behaviour named and shamed. Attorney General Christian Porter said today that Cabinet had given approval to draft the legislation that was promised in Liberal's pre-election agenda. The legislation would be based on a similar system used in Britain (see <http://www.news.com.au/perthnow/story/0,21598,25853396-5017005,00.html>).

The Aboriginal Legal Service of WA has of course rightly and properly pointed to the fact that this would go against the UN principles and also that it would have very serious deleterious effects as far as young indigenous (as well as non-indigenous) offenders were concerned. It is probably a case of 'stand by' to see precisely what the legislation says, but it appears that it will follow that in the United Kingdom.

Now if you think that Western Australia is out of touch it is not, because in Canada the Harper government which recently won re-election had a platform which included that of naming violent young offenders and of course in the United Kingdom they've had such legislation for numbers of years under the government of

Tony Blair. They were introduced as Anti-Social Behaviour Orders (ASBOs) and the idea was that these would give young offenders a short, sharp shock — something that would bring them up to a sudden halt so that they would not go on to much more serious crimes and they were designed to protect the community. It was left to the discretion of local magistrates as to how they would identify and shame young offenders but it was also clear that the courts had the power to grant identification of the young offenders and older offenders and also to make sure that they were shamed in particular ways.

Pressure to publicise the names of children who receive anti-social behaviour orders is growing, *The Guardian*, 24 October 2004

One of the benefits of naming them is to give them a short, sharp shock. Unless something brings them up to a sudden halt, they could go on to commit much more serious crimes. Anti-social behaviour orders are designed to protect the community. It becomes a complete mockery if the guilty parties cannot be named. Everyone seems to support and understand the stance taken by the paper, except the local magistrates (see <http://www.guardian.co.uk/society/2001/oct/24/housingpolicy.schools>).

Here is one example of how these provisions were described.

***The Observer*, Sunday 12 October 12 2003**

At first glance, the leaflet looked much like any other junk mail: a credit card offer perhaps, a new takeaway or advert for double glazing. But when residents in Neasden in north-west London took a closer look at the literature that arrived on their doormats they realised this was something quite different. In a unique experiment, seven local youths, the youngest just 15, were named and shamed in the leaflet as members of a gang that had been terrorising the neighbourhood. In the first mass Anti-Social Behaviour Order (ASBO) in Britain, all seven were banned from the streets in the Chalkhill area of Neasden, where they were said to have waged a campaign of harassment for two years. ... The names and photographs of all seven were printed, along with a map outlining the areas from which they were excluded (see <http://www.investigation.co.uk/news/first-mass-asbo-in-britain/>).

So that is what ASBOs involve and they are so well-known now that if you want to buy a T-shirt for your youngster you can get them in a variety of colours. Of course the ones who are wearing them are not the ones who are subject to real ASBO orders for they wouldn't be able to afford to buy the T-shirt in the first place.

4. NSW SELECT COMMITTEE

Now let me say a little about the NSW select committee that has investigated this in quite an important way. It has become a political issue in NSW as to whether or not naming and shaming should be taken further than it is at the present time. In 2007 the Attorney General John Hatzistergos announced that he given the bipartisan NSW legislative standing committee on law and justice a reference to throw out the

current laws and start again, that is the laws relating to the privacy protections for young people. He said it was time to look at the reasons why young people cannot be named even if they appeared in an adult court remained valid and he mentioned specifically the gang rape case, that I have drawn your attention to earlier the MMK and others case.

Name Them, Shame Them - Finally lemma Gets Tough on Juvenile Crime, by Janet Fife-Yeomans, *Daily Telegraph*, 5 October 2007

Attorney General John Hatzistergos ... has given Parliament's bipartisan standing committee on law and justice a reference to throw out the current laws and start again. ... Mr Hatzistergos said it was time to look at whether the reasons why young people cannot be named, even if they appear in an adult court, remain valid. He cited the recent gang rape trial by six Pakistani brothers.

It went to the legislative council select committee and the committee conducted extensive hearings and called on submissions. I was invited among others to give testimony to the committee and after a number of months they produced a report that was unanimous. It was also a multi-party report recommending very strongly that all the existing protections should be maintained and not only that but that they should be extended to the investigative stage of criminal proceedings since at the present time that is not covered by the protection in NSW or indeed in other jurisdictions as well. They also suggested that there should be uniform laws in Australia in that it was ridiculous in our federal system at this time given the UN Convention that each state and territory should have its own provisions.

I suspect that Hatzistergos was a little surprised by this — it was not what I imagine he wished for but to give him credit the government did respond and accepted seven out of eight major recommendations. The major one that they rejected was that there should not be any extension of the provisions to the investigative stage but otherwise they were prepared at that stage anyway to stand where they were. Although the Attorney General did hint that the courts might need guidance about how they might exercise their discretion in the future. Stand by for more action on this!

So, does shaming work in the first place. Well we've tried it fairly consistently over the years. I guess if you were back in the 18th century you would have been put in the stocks and had a few items thrown at you as well as being shamed in that way. It did not seem to solve the crime problem. Indeed in the NSW committee's report there is strong compelling evidence that naming and shaming has a counterproductive effect: it stigmatises, it is likely to lead to labelling, it may even be seen as a badge of honour and may in some quarters instead of making you feel shamed it might make you feel more important; and it might also lead to vigilante action being taken against you.

5. INTERNATIONAL DEVELOPMENTS

To close, I will just look at some of the consequences resulting from those ASBOs in the United Kingdom. To do so I draw on an excellent series of photojournalism produced by *The Guardian* in England by Alex Sturrock and I refer to these photographs.

The Guardian, 19 April 2007

Bobby, 13 (left) and Craig, 11, (right), pictured with their mum and sister. After both boys received Asbos, Craig's face made the front page of the local paper and leaflets were distributed with his name and face on. Craig now finds himself on the receiving end of threats and abuse by adults in the street (see <http://www.guardian.co.uk/society/gallery/2007/apr/19/1?picture=329784533>).

Adam Rooney, 20, told me he had only ever had two minor charges against him before he and his twin brother, Liam, were given Asbos. Liam is in now in prison for breach of an Asbo and Adam's picture is on the back of buses on three local bus routes. He now finds it impossible to get a job. I arranged another meeting with Adam after I took this picture. When I arrived I found out he was in custody again and couldn't make it (see <http://www.guardian.co.uk/society/gallery/2007/apr/19/1?picture=329784503>).

Fourteen-year-olds Tamsin and Tiffany Nutley, pictured with their mum and nan, were given Asbos for being in a group of girls whose crimes included singing and shouting in the street, and knocking on people's doors and running away. They were singled out from the group then put in to the local paper. They also had leaflets distributed about them, causing sections of the local community to turn their back on them. They are not allowed to whistle or sing in the streets (see <http://www.guardian.co.uk/society/gallery/2007/apr/19/1?picture=329784542>).

Those are some of the examples of ASBOs (see website for additional examples) and those are the ones that the Western Australian government appears to be drawing on for the drafting its new laws.

6. PLANNED RESEARCH

So there is clearly a dire need for research in this area. My co-author and I have recently been funded to conduct a study in the Northern Territory about the impact of the current Territory laws as much as they allow the publishing of the names of young offenders as a matter of course unless an intervention is made to close the court or prohibit publication and we hope to do this by interviewing key stakeholders, by doing a media analysis to look at the actual types of publicity that is given to these court cases in the NT both electronic and print, and then also to

identify we hope a number of case studies and to do in much the same way that Alex Sturrock has done in this instance to describe what happens to the young people and their families. We are very fortunate and grateful to have the support of NAAJA in this project that we are about to engage in. Regrettably the research is not as yet underway so there are no results to report. Stand by for another talk later about these results!

6. FUTURE DIRECTIONS

So where are we heading in the future.

The Guardian, 19 April 2007

Billy is from Dagenham in Essex. He has an Asbo for hoarding rubbish and keeping livestock in his house. When the council cleaned out his house they removed over 700 bin bags of rubbish (see

<http://www.guardian.co.uk/society/gallery/2007/apr/19/1?picture=329784506>

Well it looks like we are going to be in for a period of 'you shall commit no nuisance' without some possibility of being subject to some form of naming and shaming if we are to introduce the British ASBO system. I hope that commonsense will prevail and that this will not be the projection, the sorts of outcomes of those ASBOs will become more broadly known. I also think that there is very strong need for action at the federal level. It was pleasing to hear the Attorney General today talk about the fact that Standing Committee of the Attorneys G is drafting uniform approaches to this issue of youth justice and would hope that one of the essential planks that should be part of that should be a recognition that we have ratified the UN CROC and that protects the privacy and it protects the identity of young people in criminal proceedings.